FORM NLRB-4479

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

(San Francisco, California)

PICK YOUR PART AUTO WRECKING,
d/b/a THE CITY TOW

Employer

and

TEAMSTERS AUTOMOTIVE EMPLOYEES
LOCAL UNION NO. 665

Petitioner

20-RC-17926

DECISION AND ORDER

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. **1/**

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer. **2**/

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6 and (7) of the Act for the following reasons**: 3/**

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by **February 27, 2004**

Dated February 13, 2004

at San Francisco, California

/s/ Robert H. Miller
Regional Director, Region 20

1/ The parties stipulated, and I find, that the Employer is a California corporation with facilities in San Francisco, California, engaged in the business of towing vehicles and collecting associated fees and fines from the owners of towed vehicles. The parties further stipulated, and I find, that during the most recent twelve-month period ending December 31, 2003, the Employer received gross revenue directly from individual customers in excess of $500,000 and purchased and received at its San Francisco, California facility goods in excess of $5,000 which originated outside the State of California. Based on the parties' stipulation to such facts, I find that it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.

2/ The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of the Act.

3/ The Employer contends that the instant petition should be dismissed on the basis that it is ceasing operations in March 2004. The Petitioner contends that the petition should be processed and an election conducted because the Employer's date for termination of its operations is not certain and because of the asserted effect of a City and County of San Francisco ordinance that requires successor contractors to retain the employees of their predecessor for a transition period of ninety days.

The unit petitioned-for herein is a group of employees working for the Employer pursuant to a towing contract between the Employer and the City and County of San Francisco ("the City"). The Employer has provided towing services to the City for the past seventeen years. Such services include the collection of associated fees and fines from the owners of towed vehicles. The most recent contract ("the Contract") between the Employer and the City expired in June 1999, but the terms of the Contract have continued pursuant to a holdover provision allowing for its continuation on a month-to-month basis. The Contract also contains two provisions requiring the Employer to act in good faith in assisting in the orderly transition of its contract services to any successor that is chosen by the City.

In 2003, the City invited bids for a new towing contract and the Employer submitted a bid. By letter dated December 5, 2003, Steve Bell, the Contract Administrator for the Department of Parking and Traffic for the City, informed the Employer that its bid proposal was not ranked the highest by the City's selection committee, but that "as provided in Section IV Step 6" the City's Request for Proposal ("RFP"), it remained possible that the City would desire to negotiate a final agreement with the Employer. The letter then quoted Section IV Step 6 of the RFP, which states:

> If at any time, and for any reason, negotiations with the selected Proposer fail to proceed to the reasonable satisfaction of the City, the City reserves the right to terminate such negotiations without liability and reject the selected Proposer's offer. The City shall then have the right to negotiate with and enter into the Final Agreement with any other qualified Proposer that participated in the Proposal process."

Bell's letter further notified the Employer that in order to continue to be a Proposer in the bid process, the Employer was required to notify his department by December 9, 2003, of its willingness to extend the prices and other commitments contained in its bid proposal through September 9, 2004. By letter dated December 9, 2003, the Employer's Executive Vice President, Cindi Galfin, notified Bell that the Employer did not wish to extend the prices and other commitments in its bid proposal. The letter further expressed the Employer's gratitude for having had the opportunity to serve the City for the previous seventeen years, and wished the City good luck in its negotiations with other companies that had submitted bid proposals.

The City awarded the new towing contract to a company called Auto Return, but at the time of the hearing, no contract had been finalized between the City and Auto Return. By letter dated December 31, 2003, Galfin notified Gerald Norman, the Executive Director of the Department of Parking and Traffic for the City, that the Employer was terminating its Contract with the City effective February 1, 2004. In the letter, Galfin stated that the Employer desired to work with the City and the new contractor it had selected in order to expedite the transition process so that the Employer could "wind up its operations in San Francisco as soon as possible." The letter proposed that the transition period be no longer than 30 days, which it considered "more than sufficient to allow for the new contractor to step in and handle the operations. . ." The letter further stated the Employer's position that this period should begin immediately with the New Year (2004) "with a view toward ceasing our operations by February 1, 2004." In the alternative, the Employer proposed that if the City wanted a longer transition period, the Employer would consider doing so, but only if a new arrangement was negotiated to allow the Employer "to avoid the continued operating losses" it was experiencing under the Contract. The letter further stated that the Employer had not formulated a proposal in this regard but was prepared to discuss the option if the City wished to pursue it. The Employer further notified the City that its intent was not to extend its Letter of Credit/Security Deposit beyond January 31, 2004.

At the hearing in this case held on January 28, 2004, Galfin testified that at Executive Director Norman's request, the Employer had subsequently extended the date for the termination of the Contract to March 1, 2004. According to Galfin, the Employer's intention was to cease its operations; that it had given notice for March 1, 2004; and that it was working with the new contractor, Auto Return, on a transition date, which it hoped would be March 1, but might be closer to March 15. Galfin also testified that she had given termination notices to employees as required by law under the WARN Act, and then had to re-notify employees because she had used an incorrect notice period. The record contains a letter from Galfin to employees dated December 17, 2003, notifying them that the Employer had notified the City that it no longer desired to manage or operate the towing services for the City. The letter further stated that the Employer anticipated "that we will cease performing towing services for the City and County of San Francisco on March 21, 2004, or within fourteen (14) days thereafter," and that this action "will be permanent." The letter notified employees that as a result of this action, their employment would be permanently terminated on March 21, 2004, or within fourteen (14) days thereafter.

The record also contains a letter dated January 17, 2004, from Galfin to the WARN Act Coordinator, notifying him that about 84 employees would be terminated as a result of the Employer's closure, and that the first separations were expected to take place on March 21, 2004, or within fourteen days thereafter. The letter stated that none of the employees were represented by any labor organization and none were able to exercise any bumping rights to displace any less senior employees. The letter included a listing by classification of the workers affected, including a general manager, three managers, fifteen supervisors and employees in the job classifications of claims clerks, customer service/cashiers, equipment operators, car checkers, lot attendants, general labor, dispatchers, gate guard, tow truck drivers and general office clerks. Letters with the same notification as this letter, also dated January 17, 2004, were sent by Galfin to the Mayor, the Chairman of Workforce Investment of San Francisco, the Private Industry Council, the Employment Development Department, and to the County Board of Supervisors.

Galfin testified that pursuant to a request by Executive Director Norman, she was meeting with Norman and Bell after the hearing in this case on January 28, 2004. According to Galfin, the agenda for the meeting was the Employer's termination date and the transition of towing operations to Auto Return. Galfin further testified that she had had a first meeting with the management of Auto Return the week prior to the hearing and she was scheduled to meet with them again the Friday after the hearing. According to Galfin, Auto Return had no capital equipment and the Employer and Auto Return were exploring the possibility of the Employer renting its equipment to Auto Return, including

forklifts, computers, software programs, office furniture, fixtures and other tenant improvements, so that Auto Return could begin towing operations in the interim period until its contract with the City was finalized. Galfin explained that the tow trucks used by the Employer were the property of two subcontractors and that Auto Return would presumably take over those contracts. The land used by the Employer is owned by the City.

According to Galfin, the new towing contract with Auto Return is going to require changes in the existing computer operations system, but she assumed that Auto Return would operate using the Employer's old system until the transition could be completed. Galfin testified that there was a lot to do in the next two months to ensure a smooth transition in operations. She testified that "we've had a 17 year relationship with the City . . . we don't want to leave anyone in a bind." However, she also testified that the Employer did not want to be held hostage to the City's negotiations with Auto Return, which could take a long time. According to Galfin, even if the contract negotiation process between Auto Return and the City fell apart, the Employer was out of the bid process. The record does not show if there is any manner in which the Employer could again bid on a new towing contract, if it had a desire to do so.

The record also contains an Ordinance 3-03 of the City and County of San Francisco, which adds Section 21.25.-2 to the City's Administrative Code. This section requires that workers employed in public off-street parking lots, garages, or storage facilities for automobiles on property owned or leased by the City be paid at the prevailing wage rate and that such workers have job protection with successor contractors to the City for a period of 90 days. Specifically, the section provides that that successor contractors must retain for a 90 day transition period, all employees who have worked at least 15 hours per week and have been employed by the terminated contractor or its subcontractors for the preceding twelve months or longer at the sites covered by the lease, management agreement, or other contractual arrangement, providing that just cause does not exist to terminate such employees. The section requires that employees of predecessor contractors who worked at least 15 hours per week be employed by the successor contractor in order of their seniority with the predecessor.

Julia Dawson, the Deputy Director for Finance and Administration of the City's Municipal Transportation Agency, Department of Parking and Traffic, testified that the above ordinance is generally applicable to the Employer. Dawson testified that she has oversight responsibility for all parking and traffic contractors. According to Dawson, her department "is currently assuming that [the Employer] will be ceasing active towing operations as of March 1. . ." However, Dawson further testified that she could not rule out the possibility that

the City and the Employer would negotiate a later termination date. According to Dawson, the City is currently exploring other options regarding the transition period, which include having Auto Return provide towing services during the period until the new contract is finalized. Dawson testified that the time frame could be weeks or months before the new contract is finalized. According to Dawson, if the contract negotiations with Auto Return break down, the City would pursue negotiations with the second-ranked Proposer. As indicated above, the Employer is no longer a proposer in the current bid process and the record does not show if there is a means by which it could be considered as a bidder in that process.

Analysis. The Employer contends that the petition should be dismissed because it is ceasing operations in March 2004. The Petitioner contends that an election should be conducted because there is no date certain for the Employer's termination of operations and because under the ordinance cited above, the successor employer must employ the Employer's workers under the terms set forth under the ordinance. For the reasons discussed below, I find that the petition should be dismissed.

The Board has consistently held that it will not conduct an election at a time when a permanent layoff is imminent and certain. See *Hughes Aircraft Company*, 308 NLRB 82, 83 (1992); *Larson Plywood Company* 223 NLRB 1161 (1976); *Martin Marietta Aluminum Inc.,* 214 NLRB 646 (1974); *M.B. Kahn Construction Co.,* 210 NLRB 1050 (1974). On the other hand, the Board has held that mere speculation as to the uncertainty of future operations is not a sufficient basis on which to dismiss a petition or to decline to hold an election. See *Hazard Express, Inc*., 324 NLRB 989, 990 (1997); *Gibson Electric*, 226 NLRB 1063 (1979); *Canterbury of Puerto Rico, Inc*., 225 NLRB 309 (1976). The Board approaches this issue on a case by case basis and must often balance conflicting interests involving the utility of conducting an election when an Employer's status is in flux versus permitting employees who wish to be represented an election as quickly as possible. See *Clement-Blythe Companies*, 182 NLRB 502 n 4; *N.L.R.B. v. Engineers Constructors, Inc*., 756 F.2d 464, 468 (6th Cir. 1985).

The instant case plainly involves more than mere speculation regarding when the Employer will cease its operations in San Francisco. The Employer has taken several steps that signify its intent to cease operations in March or early April 2004. It has notified the City and other appropriate entities of its intent in this regard, and it has given the notice required by law to its employees of their termination by March 21, 2004, or within two weeks thereafter. Specifically, the Employer has notified the City that it is terminating its towing contract with the City within that time frame; that it does not intend to stay in business past March

2004; that it is not extending the terms of its bid for a new towing contract; and that it does not wish to be considered as a proposer if the negotiations between the City and Auto Return prove unsuccessful. The Employer has also met with Auto Return on at least one occasion in an attempt to ensure a smooth and speedy transition of the City's towing services to that company. Indeed, City official Dawson testified that the City is operating under the assumption that the Employer will cease operation in March 2004.

While negotiations are ongoing between the Employer and the City concerning how towing services will be provided in the interim until Auto Return or some other contractor takes over the operation from the Employer, and both Galfin and Dawson acknowledged that arrangements may possibly be made that would keep the Employer in operation beyond March 2004, it is plain from the record that the Employer has done everything possible to cease its operations within the next two months and the City is operating on that assumption. Based on such evidence, showing that the Employer will close in late March or early April 2004, I find that there is no useful purpose to be served by holding an election at this time. I reject Petitioner's argument that an election should be conducted because there is no date certain for the Employer's closure. Nor do I find relevant Petitioner's argument regarding the effect of the City ordinance discussed herein which, in any event, is too speculative a factor to warrant consideration. See *Hughes Aircraft Co.,* 308 NLRB at 83.

Accordingly, I am dismissing the petition. However, I will consider any motion for reconsideration of this decision that is supported by new evidence establishing facts inconsistent with the Employer's imminent closure.

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